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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DENISE COLEMAN,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO et al.,

Defendants and Respondents.

A124106

(San Francisco City & County
Super. Ct. No. CPF-08-508129)

I. INTRODUCTION

Denise Coleman (Coleman), a deputy sheriff, appeals from an order sustaining without leave to amend the City and County of San Francisco's (CCSF) demurrer to her first amended writ petition seeking to enforce an arbitration decision by the Administrative Appeals Board (Board). Specifically, Coleman seeks to enforce those parts of the arbitration decision overturning the San Francisco Sheriff's (Sheriff) action releasing Coleman from a probationary period for a promotion to senior deputy and requiring the Sheriff to reinstate and extend her probationary status. The issue presented by this appeal is whether the Sheriff can delegate to the Board his discretion to release an employee from probation. We hold this discretion cannot be delegated and therefore the Board had no jurisdiction to overturn the Sheriff's release of Coleman from probation and require that she be reinstated. Accordingly, those aspects of the Board's decision are unenforceable, and we affirm the order and dismissal of Coleman's writ petition.

II. BACKGROUND

We set forth the factual background of the case to the extent necessary to address the issue on appeal. Coleman is a permanent employee of the CCSF, employed as a deputy sheriff with the San Francisco Sheriff's Department (Department). In May 2006, Coleman was in approximately her tenth month of a probationary period for a promotion to senior deputy. On May 8, while she was the watch commander at a county jail, an inmate with psychiatric issues smeared feces on himself and his cell. Coleman directed her subordinates to spray the inmate with a fire hose.

The Department notified Coleman her conduct during the incident violated several Department rules and regulations and it was recommending a five-day suspension without pay.

Following a "*Skelly*"¹ hearing, the Sheriff reduced Coleman's suspension from five days to one. The Sheriff stated in his decision: "[Y]ou were charged with unacceptable performance, neglect of duty, and misconduct. These violations of Department Rules and Regulations stem from an incident, on duty, on May 8, 2006. On that date, you directed sworn staff to use a pressured fire hose on an inmate naked and in a safety cell with serious psychiatric problems. The inmate was not combative or assaultive and could have been re-housed without the use of force. More significantly, a fire hose is not an approved piece of equipment in the management of inmates. [¶] I accept that you were acting without intent to cause injury and with the health of sworn staff as your motivation. However, this is not an acceptable justification. [¶] I am

¹ *Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194, 215, sets out the procedural due process required before a public employee may be disciplined: "[D]ue process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

reducing the proposed suspension to one (1) day; please see your supervisor to schedule the suspension. [¶] Since I find you were in violation of San Francisco Sheriff Department Rules and Regulation, 2.30, unacceptable job performance, I must also consider the nature of this incident in connection to your probationary status. [¶] You are a committed deputy and a valued employee but I do not believe you are ready to assume primary responsibility of deputies as a supervisor. Accordingly, I am returning you to your position as an 8304 deputy sheriff effective August 12, 2006, based on your failure to satisfactorily complete probation as an 8304 senior deputy.”

Coleman appealed her suspension to the Board. The Board, which consisted of arbitrator William E. Riker, Lieutenant Kevin Paulson of the Sheriff’s Department, and David Wong, president of the Deputy Sheriffs’ Association, issued a decision in January 2007. In its decision, the Board identified the issue as whether the deputy was “disciplined for just cause; if not, what is the appropriate remedy?” It also observed: “The parties agreed the matter is properly before the . . . Board and that the decision is final and binding.” The Board found “[t]he Department had just cause to discipline Senior Deputy Denise Coleman” and therefore sustained the one-day suspension without pay. It also ordered that “Denise Coleman is to be reinstated to Senior Deputy status, with no retroactive back pay” and directed that her “probationary period is extended for six months commencing from February 1, 2007 through July 31, 2007.”

Counsel for the Sheriff requested that the Board issue a modified decision eliminating the provisions purporting to reinstate Coleman and extend her probationary period for six months. Counsel stated that only the Sheriff had authority to place and remove employees from probationary status. Counsel also notified Coleman’s attorney that the Sheriff considered the Board’s reinstatement and extension of her probationary period to be a recommendation only since the Board lacked jurisdiction to review the Sheriff’s decision to remove her from probation.

Riker responded by letter on behalf of the Board. He agreed “the Sheriff has the sole authority to determine whether an employee completes his/her probationary period. In fact, Appendix A, Article X of the CBA^[2] identifies that probationary employees do not have access under the article to appeal the Sheriff’s decision to demote an employee while on probationary status, and results in the individual on probation reverting back to the status they had prior to their promotion.” Riker also stated, however, “the Board was given no such limitation of its jurisdiction when the matter was assigned to the . . . Board by the Department. At the commencement of the hearing the Department and Union, on the record, affirmatively applied [*sic*] that the matter of the discipline and remedy was timely, properly before the Board, and that the Board’s decision was final and binding on the parties.”

On February 26, 2008, Coleman filed a petition for writ of mandate to enforce the arbitration decision, and specifically the provisions concerning her probationary status, as a written contract under Code of Civil Procedure section 1287.6. The trial court sustained CCSF’s demurrer with leave to amend “to allege, if she is able, waiver of and/or estoppel [of the Sheriff] to assert the applicable rules” regarding the Sheriff’s sole discretion to remove an employee from probation.

On July 7, 2008, Coleman filed a first amended petition, to which CCSF again demurred. The trial court sustained the demurrer without leave to amend on the ground the Sheriff did “not have the authority to delegate to an arbitrator his power to decide the probationary status of an employee. . . .” This timely appeal followed.

² “CBA” refers to the collective bargaining agreement between CCSF and the San Francisco Deputy Sheriffs’ Association.

III. DISCUSSION

A. Standard of Review

“On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Next, we treat the demurrer as admitting all material facts properly pleaded. Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] [¶] We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.] If a complaint is insufficient on any ground specified in a demurrer, the order sustaining the demurrer must be upheld even though the particular ground upon which the court sustained it may be untenable.” (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439-440.)

The order sustaining CCSF’s demurrer without leave to amend can be construed as a final judgment, from which Coleman timely appealed. (See *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157 & fn. 3.) “Despite the absence of a separate formal judgment, an order denying a petition for a writ of mandate ‘constitutes a final judgment for purposes of an appeal.’ ” (*Wong v. Ohlone College* (2006) 137 Cal.App.4th 1379, 1382, fn. 3, quoting *Public Defenders’ Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409.)

B. The San Francisco Administrative Code and Charter Provisions

In order to provide context to the issue on appeal, we trace the source of the Sheriff’s power to release a probationary employee. The San Francisco Charter (Charter) “ ‘represents the supreme law of the City and County of San Francisco, subject, of course, to conflicting provisions in the United States and California Constitutions, and to preemptive state law.’ [Citation.]” (*San Francisco Firefighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 898 (*San Francisco Firefighters*).) The

Charter provides CCSF and “recognized employee organizations representing classifications of employees [have the] . . . mutual obligation to bargain in good faith on all matters within the scope of representation. . . .” Certain excluded matters are “not . . . subject to bargaining under this part,” and are within the exclusive jurisdiction of the Civil Service Commission. These excluded matters include “probationary status and the administration of probationary periods, except duration. . . .” Because probationary status is under the jurisdiction of the Civil Service Commission, the memorandum of understanding between CCSF and Coleman’s union, the San Francisco Deputy Sheriff’s Association, recognized it is “not subject to grievance or arbitration.”

The Charter further provides the Civil Service Commission “shall adopt rules, policies and procedures to carry out the civil service merit system provisions of this charter and . . . such rules shall govern . . . probationary status and the administration of probationary periods, except duration. . . .” (S.F. Charter, § 10.101.) The Civil Service Commission has thus promulgated rules regarding the release of an employee during the probationary period. “An employee may be released by the appointing officer at any time during the probationary period upon written notice to the employee and the Human Resources Director.” (Civ. Serv. Comm., rule 117.9.1, subd. (1).)³ “Except if the release is for disciplinary reasons and subject to approval of the Human Resources Director, an employee released during a promotive probationary period shall revert to a position in the class from which promoted.” (Rule 117.9.3, subd. (1).) The Sheriff is the “appointing officer” in the Sheriff’s Department. (S.F. Admin. Code, ch. 2A, art. II, § 2A.30.)

³ All rule references are to the Civil Service Commission unless otherwise indicated.

C. Sheriff's Authority to Determine Probationary Status

Coleman, cognizant of the Civil Service Commission Rules, does not dispute the Sheriff has the discretion to remove an employee from probation at any time, with or without cause. Coleman instead asserts the Sheriff can delegate or waive that authority and that he did so in this case. CCSF maintains the Sheriff has the exclusive and *nondelegable* authority to remove an employee from probation.

Discretionary powers given to a public official generally may not be delegated. “ ‘[L]egislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer, cannot be delegated to others. . . .’ ” (*San Francisco Firefighters, supra*, 68 Cal.App.3d at p. 902, italics omitted, quoting *Sacramento Chamber of Commerce v. Stephens* (1931) 212 Cal. 607, 610.) In *San Francisco Firefighters*, the city and the firefighters’ union agreed to a memorandum of understanding which provided that “ ‘unresolved issues between the parties relating to employment conditions, including grievances but excluding discipline[e]’ ” would be submitted to arbitration. (*San Francisco Firefighters, supra*, at p. 900.) The San Francisco Charter gave the fire commission authority to prescribe its own rules and regulations consistent with the Charter. The city maintained this authority was exclusive to the fire commission, and could not be delegated to an arbitrator. (*Id.* at p. 901.) The Court of Appeal agreed. “ ‘[T]he principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others, *unless so authorized by the legislature or charter*. In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he [or she] *cannot delegate it to others, as by submitting it to arbitration.*’ ” (*Ibid.*, quoting 2 McQuillin, *The Law of Municipal Corporations* (3d ed. 1966) § 10.39.)

The court in *San Francisco Firefighters* relied on *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, which held the city council could not delegate its power to

set the compensation of city employees. “When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.” (*Id.* at p. 24.)

Coleman argues *Bagley* is distinguishable because the statutory language there gave the power to fix compensation to the city council alone (“ ‘the city council shall fix the compensation of all . . . employees’ ”), while the Civil Service Commission Rule here supposedly does not give discretionary power over probation exclusively to the Sheriff.⁴ (*Bagley, supra*, 18 Cal.3d at p. 24.) Rule 117.9.1 provides: “An employee *may* be released by the appointing officer at any time during the probationary period upon written notice to the employee and the Human Resources Director.” Coleman argues use of the word “may,” rather than the directive “shall,” demonstrates the discretion to release a probationary employee is not exclusive to the Sheriff.

We disagree with this strained interpretation of rule 117.9.1. The word “may” as used in this rule makes the decision itself discretionary. The identity of the decision maker, however, is mandatory—it is the appointing officer. Coleman points to nothing in the Charter or any statute suggesting that anyone other than the Sheriff has the power to make this decision. Under the familiar maxim *expressio unis est exclusio alterius*, the specification of the appointing officer alone as the decision maker evidences the intent to render his or her power exclusive. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 666.) More importantly, the power to remove an employee from probation could only be delegable if “ ‘authorized by the legislature or charter,’ ” which it is not. (*San Francisco Firefighters, supra*, 68 Cal.App.3d at p. 901, italics omitted.)

⁴ In the trial court, Coleman acknowledged the Sheriff’s right to “remove Coleman from probation at any time for any reason” *was* exclusive.

Coleman next claims while the policy decision to create a probationary period cannot be delegated, the decision to release an employee from probation can be because it is the means by which a policy is effectuated. Coleman relies on what she claims is the analogous doctrine that a legislature may delegate the rulemaking necessary to carry out a law, but not the power to enact the law, citing *Kugler v. Yocum* (1968) 69 Cal.2d 371 (*Kugler*) and *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 363 (*Wheeler*). Neither of these cases aid Coleman.

In *Kugler*, an ordinance was proposed setting City of Alhambra firefighters' salaries at no less than the average firefighters' salaries in Los Angeles, an adjoining city. Opponents of the law maintained using the Los Angeles salaries as a floor "would unlawfully delegate legislative power to those parties who establish salaries for Los Angeles firemen." (*Kugler, supra*, 69 Cal.2d at p. 375.) The court disagreed, holding once Alhambra established the "policy of parity between the Alhambra and Los Angeles wages," the participation of Los Angeles authorities in wage-setting was appropriate because Alhambra could expect Los Angeles authorities to reasonably perform that task. (*Id.* at pp. 382-383.) Similarly in *Wheeler*, plaintiffs claimed the planning commission's and city council's authority to grant a conditional use permit upon the finding of certain facts was an unlawful delegation of legislative power. (*Wheeler, supra*, 90 Cal.App.2d at p. 362.) The court disagreed, holding the requirement that the city council find certain facts in order to issue the permit rendered its discretion not so "arbitrary or . . . unguided as to invalidate the statute. . . ." (*Ibid.*)

In contrast, the power of the Sheriff here is completely discretionary and "unguided." Neither the Charter nor the rules promulgated by the Civil Service Commission provide any guidance or limits on an appointing authority's exercise of its discretion in this regard. The parties agree the Sheriff had the power to remove an employee from probationary status at any time with or without reasons. The Sheriff's

unfettered discretion to release an employee from probation is not the type of power that could be delegated to the Board.

Coleman also argues a release from promotive probation is like employee discipline, which may be delegated. Regardless of any similarities between a removal from probation and discipline, the Charter specifies that probationary status and administration of probationary periods are within the exclusive jurisdiction of the Civil Service Commission.

Because the Sheriff's discretion with respect to probationary status is *nondelegable* as a matter of law, we do not need to reach Coleman's other arguments that various actions or inaction by the Sheriff constituted a delegation of his discretionary power. We likewise do not reach her assertion that the Sheriff "agreed" to the Board exercising such authority. Moreover, even assuming the Sheriff could waive his discretion, which we have explained he cannot do, there was no explicit relinquishment of that power. The Sheriff's general agreement that the "matter" was "properly before the Administrative Appeals Board and that the decision is final and binding" can only be read as acknowledging the propriety of arbitration within legal parameters.

IV. DISPOSITION

The order sustaining CCSF's demurrer without leave to amend and dismissal of Coleman's petition is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.